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In the Supreme Court of the United States

OCTOBER TERM, 1976

HANDY HARDWARE WHOLESALE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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The opinion of the court of appeals (Pet. App. A-23 to A-29) is reported at 542 F. 2d 935. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A-22) are reported at 222 NLRB 373. The Board's decision in the related representation case is set forth at R. 20-25 and R. 51.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A-30 to A-31) was entered on December 10, 1976, and a timely petition for rehearing was denied on January

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[1] "R." refers to the record in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

10, 1977 (Pet. App. A-32).[2] The petition for a writ of certiorari was filed on April 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board should have held an evidentiary hearing to explore petitioner's contention that union organizational activity by an alleged supervisor during a representation election campaign warranted setting aside the election.

2. Whether the Board, in finding that petitioner had unlawfully refused to bargain with the Union, properly considered evidence showing that pre-complaint refusal to bargain continued into the post-complaint period.

STATEMENT

1. The Regional Director of the National Labor Relations Board conducted an election among certain employees at the Houston, Texas, facility of petitioner (the Company) (Pet. App. A-5). The Union[3] won the election by a vote of 19 to 1 (*ibid.*).[4] The Company objected to the election on the ground, *inter alia*, that the Union utilized the services of a Company supervisor, Dennis Baker, in its organizational campaign (R. 6).

The Regional Director conducted an administrative investigation, after which he concluded that Baker, after being named as an employee organizer, had approached his

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[2]On April 6, 1977, Mr. Justice Powell denied petitioner's motion for a stay of the judgment pending the disposition of the petition for certiorari.

[3]Teamsters, General Drivers, Warehousemen and Helpers, Local Union No. 968, affiliated with the International Brotherhood of Teamsters.

[4]Challenges to 13 ballots were not resolved because they could not affect the results of the election (Pet. App. A-5).

superior and asked to be relieved of his "supervisory" functions. The superior agreed, and thereafter Baker performed only the duties of stocking and order pulling in the Company's warehouse (R. 23).[5] The next week Baker was discharged, and the Company's President called a meeting of employees to explain that Baker's termination resulted from his union activities (R. 24).

Baker filed a charge with the Board, alleging a violation of Section 8(a)(3) and (1) of the Act. After the election Baker and the Company entered into a settlement agreement; Baker was offered, but rejected, reinstatement, and he was paid back wages (R. 23 n. 3).

The Regional Director, assuming *arguendo* that Baker was a supervisor until relieved of his duties and that all of the Company's allegations were accurate,[6] concluded that Baker's activities did not warrant setting aside the election. Noting that Baker was fired six weeks before the election, and that the employees were simultaneously informed that

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[5]Baker was initially employed in June 1972 as a stocker and order-filler in the warehouse. Sometime later he was placed in charge of a portion of the warehouse and, in that capacity, routinely directed the work of three to five other employees (R. 22-23). Even after his promotion, however, Baker continued to perform manual labor—either stocking or filling orders—for the better part of each day (R. 22). He had no authority to hire or discharge employees, grant time off, or assign overtime, and had never recommended disciplinary action against employees (R. 23). The Regional Director concluded that Baker was an employee and not a supervisor within the meaning of the Act (*ibid.*).

[6]The Company alleged that Baker attended a meeting of employees held at the union hall shortly before the election. During this meeting someone stated that Baker did not have to be concerned about his job because, in view of his pending charge against the Company, he would soon be reinstated. The Company also alleged that Baker held a meeting of employees on the plant parking lot after being fired but before the election (R. 15-16).

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he had been fired for union activities, the Regional Director found that Baker's actions could not have induced the employees to believe that the Company favored the Union. Similarly, the Regional Director found that Baker's discharge before the election eliminated any chance that employees could have been induced to vote for the Union out of fear that Baker otherwise would use his supervisory position to punish employees voting against the Union (R. 24).

The Board sustained the Regional Director and certified the Union as the representative of the Company's employees (R. 51).

2. On December 27, 1974, the General Counsel issued a complaint charging that on November 15, 1974, and thereafter, the Company had refused to bargain with the Union, although the Union had requested and was continuing to request that the Company do so (Pet. App. A-2 to A-3). When the Company's answer reiterated that the election should be set aside for reasons previously considered and rejected in the representation proceeding, the Board's General Counsel moved for summary judgment (Pet. App. A-3).

The General Counsel later filed an amended motion for summary judgment, attaching as exhibits three letters from the Union to the Company, dated November 15 and December 5, 1974, and January 16, 1975, requesting the Company to bargain (Pet. App. A-8 to A-9). In response to a notice to show cause why the amended motion should not be granted, the Company denied knowledge of requests to bargain and objected to the attachment of the January 16, 1975, letter because it post-dated the complaint.

The Board granted the amended motion for summary judgment. The Board stated (Pet. App. A-9, footnote omitted):

> The contents of these letters have not been controverted by the [Company] and therefore are deemed to be true, and establish requests to bargain from November 15, 1974. Further, the allegation * * * that the [Company] has failed to respond to the requests despite the passage of a reasonable time stands uncontroverted and is accepted as true, and establishes the refusal to bargain as of November 15, 1974.

3. The court of appeals enforced the Board's order. The court found that the objection based on Baker's activity was properly rejected because it "was reasonable for the Board to determine that since Baker was not employed by [the Company] during the last six weeks of the election period, impermissible coercion resulting from his favoritism for the Union was inconceivable" (Pet. App. A-27). The court rejected the argument that events following Baker's discharge—the filing of the unfair labor practice charge, the issuance of a complaint thereon, and the statements allegedly made at the pre-election meeting concerning Baker's possible reemployment—required an evidentiary hearing. The court explained (Pet. App. A-28, citation omitted):

> [The Company's] argument is indeed attenuated. First it assumes that Baker was a supervisor; next that employees knew, although then discharged, he probably would be reemployed, and reemployed in a supervisory capacity. One would then have to conclude that this likelihood of reemployment acted coercively on employees who feared that, once rehired, Baker would take retribution against them if they had not supported the Union.
>
> The question of whether this conduct or, more aptly, probability of future conduct, tended to interfere with employees' free choice is primarily committed to the discretion of the Board. We find that discretion was reasonably exercised in this case.

The court also rejected the Company's argument that the General Counsel's reference to events after the date of the complaint violated requirements of the Administrative Procedure Act and the Board's own regulations, concluding (Pet. App. A-29):

> The additional instance of failure to bargain proven here did not constitute a separate unfair labor practice but was instead a continuation of the same illegality alleged in the complaint. There was no specific reliance by the Board upon the complained-of evidence of refusal to bargain. * * *
>
> As the alleged violation in the present case was a failure to bargain, the continuing failure past the date of the complaint was relevant and obviously an outgrowth of the earlier allegation. [The Company] was sufficiently notified by the complaint of the grounds of the charges against it and was not prejudiced by the amended motion [for summary judgment].

ARGUMENT

1. There is no substance to petitioner's claim (Pet. 10-11, 20-22) that the Board should have held an evidentiary hearing on its objection respecting Baker's activity. A hearing is required only where substantial and material factual issues are raised. See *National Labor Relations Board* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74, 75-76 (C.A. 5); *National Labor Relations Board* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249-250 (C.A. 4). The Board properly found that petitioner had failed to meet this burden. Even if all of petitioner's factual assertions could be substantiated, they would not demonstrate that Baker's activity tended to interfere with employee free choice in the

election. See the court of appeals' discussion, which considers and rejects petitioner's arguments (Pet. App. A-26 to A-28).[7]

2. Petitioner's further contention (Pet. 22-25) that the Board violated the notice requirements of the Administrative Procedure Act and its own rules is incorrect. As the court of appeals explained (Pet. App. A-28 to A-29), petitioner was not prejudiced by the General Counsel's addition, in the amended motion for summary judgment, of a letter showing that petitioner's pre-complaint refusal to bargain continued after the filing of the complaint.

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[7] There is no evidentiary basis for petitioner's statement (Pet. 9) that on at least one occasion before his discharge Baker sent one employee to threaten another employee in an effort to obtain a signature on a union authorization card. This allegation formed the basis for a separate objection before the Board, which was overruled because petitioner failed to submit any supporting evidence (R. 22). The court of appeals approved the Board's disposition of this objection as well (Pet. App. A-26).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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